

Tentative Rulings for November 9, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG00184	<i>City of Huron v. PYJKE Company One LLC et al.</i> (Dept. 501)
15CECG00835	<i>Carter v. Sharlow</i> (Dept. 501)
16CECG00038	<i>Hedstrom v. Comprehensive Addiction Programs Inc.</i> (Dept. 501)
16CECG02298	<i>Espinoza v. Foster</i> (Dept. 503)
15CECG03410	<i>Smith v. Saint Agnes Medical Center</i> (Dept. 503)

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

03

Tentative Ruling

Re: ***Vang v. Two Jinn, Inc.***
Case No. 16 CE CG 01615

Hearing Date: November 9th, 2016 (Dept. 402)

Motion: Defendants' Demurrer to Complaint

Tentative Ruling:

To sustain the demurrer to the first cause of action, with leave to amend, for failure to state facts sufficient to constitute a cause of action. (Code Civ. Proc. § 430.10, subd. (e).) To sustain the demurrer to the second and third causes of action as to plaintiff Benjamin Mora, without leave to amend, for failure to state facts sufficient to constitute a cause of action. To overrule the demurrer to the second and third causes of action as to plaintiff May Vang. To overrule the demurrer to the fourth and fifth causes of action as to both plaintiffs. To overrule the demurrer to the sixth cause of action as to May Vang, but to sustain as to Benjamin Mora, without leave to amend, for failure to state facts sufficient to constitute a cause of action. To overrule the demurrer to the seventh cause of action as to both plaintiffs.

Explanation:

First Cause of Action: "The elements of a cause of action for intentional misrepresentation are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) actual and justifiable reliance, and (5) resulting damage." (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1166, internal citation omitted)

"Causes of action for intentional and negligent misrepresentation sound in fraud and, therefore, each element must be pleaded with specificity. 'The specificity requirement means a plaintiff must allege facts showing how, when, where, to whom, and by what means the representations were made, and, in the case of a corporate defendant, the plaintiff must allege the names of the persons who made the representations, their authority to speak on behalf of the corporation, to whom they spoke, what they said or wrote, and when the representation was made.'" (*Id.* at pp. 1166–1167, internal citations omitted.)

Here, plaintiffs allege that defendants made false representations to them, but it is unclear precisely what representations are alleged to have been false, how they were false, or how plaintiffs relied on the representations to their detriment. To the extent that they claim that defendants misrepresented their authority when they demanded to be admitted into the residence for the purpose of searching for Mike Vang, plaintiffs have

not alleged any facts showing that defendants actually made any statements that misrepresented their authority.

While not clearly alleged, it appears from the complaint that the persons who entered plaintiffs' home were working for Aladdin and CSI as bail agents, and that they entered the home and conducted the search as part of their attempts to locate Mike Vang, who was a fugitive who had absconded after defendants posted his bail. (Complaint, ¶¶ 2, 16, 17, 18, 21, 23, 24.) Plaintiffs do not allege that defendants' agents were not properly licensed bail recovery agents under Penal Code section 1299.02.

If defendants were authorized and licensed bail recovery agents, then they had the right to search for a bail fugitive like Mike Vang and arrest him, subject to certain limitations and requirements under the Bail Fugitive Recovery Persons Act. (Penal Code § 1299, *et seq.*) There is no allegation that the agents stated that they were police officers or government agents, or wore false badges, uniforms, or identification that implied that they were police or government officials, which would have been a violation of Penal Code section 1299.07. In fact, plaintiffs allege that defendants' agents refused to identify themselves other than with a business card for the supervisor, Mr. Adkisson. (Complaint, ¶¶ 10 - 12.)

Also, while plaintiffs allege that defendants refused to provide any documentation showing that they had the authority to enter and conduct a search of the residence (Complaint, ¶ 11), there is nothing in the Bail Fugitive Recovery Persons Act that requires a bail recovery agent to provide documents authorizing him or her to enter and search a residence. Under Penal Code section 1299.06, "Before apprehending a bail fugitive, an individual authorized by Section 1299.02 to apprehend a bail fugitive shall have in his or her possession proper documentation of authority to apprehend issued by the bail or depositor of bail as prescribed in Sections 1300 and 1301." (Pen. Code, § 1299.06.) However, there is nothing in the statute that requires the bail recovery agent to provide such documents on the request of the person whose home is about to be searched. Thus, defendants' alleged refusal to provide documents regarding their authority to enter and search for the fugitive was not a violation of the law.

In any event, even if the failure to provide such documents did violate section 1299.06, it is unclear how this failure constituted a misrepresentation of fact to the plaintiffs, or how they relied on the representation to their detriment. Plaintiffs do not allege that defendants lied about having the proper documents to authorize their attempt to locate and arrest Mike Vang, but only that they refused to provide such paperwork on demand. It is not clear how this refusal to provide documents showing defendants' authority translates into a misrepresentation of their authority.

Plaintiffs also allege that "It is unknown if Defendants complied with Penal Code section 1299.8 [sic, 1299.08] in notifying Local Law enforcement (Fresno Police Department) of their intended actions." (Complaint, ¶ 24.) "If such notification was made either Defendants misrepresented the authority for such action or FPD did not follow any lawful procedure by authorizing such action." (*Ibid.*)

Section 1299.08 states that, "Except under exigent circumstances, an individual authorized by Section 1299.02 to apprehend a bail fugitive shall, prior to and no more than six hours before attempting to apprehend the bail fugitive, notify the local police department or sheriff's department of the intent to apprehend a bail fugitive in that jurisdiction..." (Pen. Code § 1299.08, subd. (a).)

Here, while plaintiffs imply that defendants may not have notified the local police of their intent to arrest Mike Vang, they admit that they do not know if such a notification was made or not. (Complaint, ¶ 24.) They also allege that, even if the notification was made, defendants' authority was misrepresented to the police, or the police did not follow proper procedure when they authorized the arrest attempt. (*Ibid.*) However, even assuming that these allegations are true, they fail to show that defendants made any misrepresentation to *plaintiffs*, as opposed to the police. Nor is there anything to indicate that the alleged misrepresentations to the police caused plaintiffs to rely on the misrepresentations, of which they apparently were not even aware. In addition, it is unclear how the alleged misrepresentation to the police harmed plaintiffs. Therefore, plaintiffs have not alleged any facts to support a fraud claim based on the alleged failure to notify the police of the defendants' intent to arrest Mike Vang.

The only representations that defendants allegedly made directly to plaintiffs were the statements of Adkisson that May Vang would be arrested and that her niece would be placed with CPS if she and her husband did not tell defendants where Mike Vang was. (Complaint, ¶¶ 16-18.) Plaintiffs claim that these statements were false, and that Adkisson knew they were false when he made them. (*Id.* at ¶¶ 19-20.)

Defendants argue in their demurrer that these statements were not false, because they had the authority to arrest May Vang or have her arrested once they found the weapon in the residence, and that, upon her arrest, her niece would have been placed with CPS for her protection. They claim that they had the power as citizens to arrest May Vang for a felony. Under Penal Code section 837, "A citizen may arrest another if a felony has in fact been committed and he has reasonable cause to believe that the person to be arrested committed it. (Pen. Code, § 837, subd. 3.)" (*People v. Fosselman* (1983) 33 Cal.3d 572, 579.)

Here, however, there is nothing in the complaint that indicates that May Vang had committed a felony, or that defendants had any reason to believe that she had. While it is alleged that defendants claimed to have smelled marijuana coming from the locked room (Complaint, ¶ 15), there is no allegation that any marijuana was found once the agents entered the room, much less that the quantity was enough to support a felony charge. Also, while plaintiffs admit that the agents found a "weapon" (Complaint, ¶ 16), there is no indication that May Vang had committed any crime by having a weapon on the premises.¹ Thus, it does not appear from the allegations of the

¹ Defendants allege that the "weapon" was a semi-automatic .22 caliber rifle, but this is not alleged in the complaint, so the court cannot consider this "fact" on demurrer. In any event, there is nothing in the complaint to show that May Vang committed a crime by possessing a rifle in her own home.

complaint that the statement that May Vang would be arrested and put in prison for 10 years was necessarily true, or that the niece would have to be given to CPS.

On the other hand, plaintiffs have failed to allege any facts showing that they relied on the allegedly untrue statements and threats to their detriment. At most, plaintiff May Vang made a phone call to her husband, and her husband spoke to Adkisson after Adkisson threatened to have May Vang arrested. (Complaint, ¶¶ 16-18.) However, simply making a phone call and having a conversation with a bail recovery agent, however unpleasant it might have been, does not show any actual damage to plaintiffs caused by the alleged misrepresentations.

The only other acts that plaintiffs allegedly performed in reliance on defendants' misrepresentations were the decision by May Vang to allow defendants to enter. (Complaint, ¶¶ 21-22.) However, the decision to allow them to enter was made by May before Adkisson threatened to arrest her and have the child placed with CPS. Therefore, plaintiff's decision to allow defendants to enter the residence and search it cannot have been caused by the later representations regarding the arrest. Consequently, plaintiffs have failed to allege any reliance on the defendants' allegedly false statements, or any resulting damage to them as a result of the reliance.

Therefore, the court intends to sustain the demurrer to the first cause of action for intentional misrepresentation, with leave to amend.

Second Cause of Action: Plaintiffs' second cause of action is for assault, based on the defendants' sending of "bounty hunters" to their home, their forceful entry into the home with guns drawn, their search of the home, and their threats to arrest May Vang and put her in prison for 10 years. (Complaint, ¶ 31.) Plaintiffs claim that they were placed in fear of unlawful touching of their person by these actions. (*Id.* at ¶ 32.) In addition, plaintiff May Vang claims that defendants refused to allow her to use the bathroom unless she left the door open so defendants could watch her, and that she refused to use the bathroom under these circumstances. (*Id.* at ¶ 33.)

"Penal Code section 240 defines the crime of assault as 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.' 'In tort actions for assault ..., the courts usually assume that th[is] Penal Code definition [] and related criminal cases are applicable. [Citations.]" The Supreme Court has held proof of a criminal assault 'requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.' Furthermore, Witkin notes the general rule that 'while apprehension of that contact is the basis of assault [citation], [m]ere words, however threatening, will not amount to an assault. [Citations.]'" (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1604, internal citations omitted.)

Here, first of all, plaintiff Benjamin Mora cannot state a claim for assault based on the facts alleged in the complaint, since the allegations show that he was not present when the agents entered and searched the home. Indeed, the agents had to have May Vang call Mora at work so they could talk to him. (Complaint, ¶¶ 17, 18.) Therefore, Mora could not have been placed in fear of imminent harmful or offensive

bodily contact, because he was not in the residence during the events alleged in the complaint. In other words, the defendants had no "present ability" to harm Mora, nor could he have reasonably feared that they would create any harmful or offensive contact with him. Plaintiffs have not filed opposition or made any effort to explain how they could amend the complaint to state a valid assault claim on behalf of Mora. Thus, the court intends to sustain the demurrer to the assault claim as to Mora, without leave to amend.

On the other hand, plaintiffs have stated a valid assault claim as to plaintiff May Vang. The allegations that defendants "threatened" her with arrest and jail time if she did not cooperate do not show any threats of violence or offensive or harmful contact to May Vang. Likewise, the refusal to allow her to use the bathroom unobserved does not show any threat of violence or harm to her person. However, plaintiff does allege that defendants' agents initially approached her "with their guns drawn and held in front of them toward Vang" (Complaint, ¶ 10), and then forcefully entered and searched her home, which supports her allegation that she was placed in fear of unlawful touching. (*Id.* at ¶ 31.)

Defendants argue that their conduct was fully lawful and authorized because they were bail recovery agents searching for a fugitive, and thus their actions cannot constitute assault. They cite to their authority as private citizens to arrest a person whom they reasonably believe to have committed a felony. (Penal Code § 837.) Also, they point out that, under Penal Code section 844, "To make an arrest, a private person, if the offense is a felony, and in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which they have reasonable grounds for believing the person to be, after having demanded admittance and explained the purpose for which admittance is desired." (Pen. Code, § 844.)

Also, "An individual, authorized by Section 1299.02 to apprehend a bail fugitive shall not forcibly enter a premises except as provided for in Section 844." (Pen. Code, § 1299.09.) In other words, the defendants must have reasonably believed that there was a person who had committed a felony in the residence when they entered in order for their search to have been lawful under sections 837, 844 and 1299.09. However, there is nothing in the complaint that states that defendants were in pursuit of someone that they believed to have committed a felony when they pointed guns in plaintiff's direction and entered her home. At most, the complaint shows that defendants were in pursuit of Mike Vang, who was a bail fugitive. (Complaint, ¶ 31.) There are no facts alleged showing that Mike Vang had committed a felony, or that defendants reasonably believed that he had. Simply jumping bail is not, in itself, a felony. Therefore, defendants have failed to show that they were acting lawfully at the time they held plaintiff May Vang at gunpoint and forced her to admit them into her home for the purposes of searching for Mike Vang.

Defendants note that plaintiffs have not alleged that they were carrying firearms illegally. However, regardless of whether defendants were licensed or authorized to carry guns when they searched plaintiffs' residence, if they threatened May Vang unlawfully with those guns, they may be liable for assault.

Defendants also claim that they had the right to detain plaintiff while they searched the residence. They cite to *People v. Castillo* (2014) 228 Cal.App.4th 414, *People v. Glaser* (1995) 11 Cal.4th 354, and *People v. Fosselman* (1983) 33 Cal.3d 572 in support of their argument. However, *Castillo* and *Glaser* held that police have the right to detain persons located at a residence when they are executing a search warrant. Here, the defendants were not police officers, but rather private bail recovery agents, and they were not executing a search warrant. Thus, *Castillo* and *Glaser* do not support their position.

People v. Fosselman, *supra*, 33 Cal.3d 572 held that a private citizen who is attempting to make a citizen's arrest of a person that he reasonably suspects of committing a felony has the right to use reasonable force to detain the suspect. (*Id.* at p. 579.) However, in *Fosselman*, the citizen actually had good reason to believe that the defendant had just committed a felony, as a woman had just flagged down his car and told him that defendant had assaulted her with a knife. (*Id.* at p. 577.) Here, on the other hand, there is nothing alleged in the complaint that indicates that defendants had any reason to believe Mike Vang had committed a felony when they forced May Vang to let them into her home at gunpoint. At most, Mike Vang had jumped his bail, which was not a felony. Therefore, defendants have failed to show that their conduct was lawful and could not form the basis for an assault claim. As a result, the court intends to overrule the demurrer as to the second cause of action with regard to May Vang.

Third Cause of Action: Defendants argue that their conduct in searching the residence and detaining May Vang was legal, so they cannot be held liable for false imprisonment. "'Imprisonment consisting merely of a lawful arrest is not false imprisonment. ... A complaint for unlawful imprisonment which fails to allege facts under which the arrest would be unlawful is insufficient.'" (*Muller v. Reagh* (1963) 215 Cal.App.2d 831, 836, internal citations omitted.)

First, since plaintiff Benjamin Mora was not present at the time of the search of the residence and there is no allegation that he was ever detained by defendants, his claim for false imprisonment will not lie. Plaintiffs have not filed any opposition or made any attempt to explain how Mora could ever state a valid false imprisonment claim under the circumstances alleged in the complaint. Therefore, the court intends to sustain the demurrer as to Mora without leave to amend.

On the other hand, May Vang has stated a valid claim for false imprisonment. She alleges that defendants' detention of her was unlawful and unauthorized. While defendants argue that they acted lawfully in detaining her during the search of the residence, none of the authorities they cite give them the unrestricted right to enter and search a residence without some reasonable suspicion that a person who has committed a felony might be inside. (Penal Code §§ 837, 844, 1299.09.) Also, while the police may have the right to detain persons in a residence when they execute a search warrant (*People v. Castillo*, *supra*, 228 Cal.App.4th 414), defendants have not cited any similar authority with regard to private bail recovery agents.

Here, there are no facts alleged that show that defendants were under the reasonable belief that someone who committed a felony was inside the residence. At

most, defendants were pursuing a bail fugitive, not a felon. Therefore, the court intends to overrule the demurrer to the third cause of action as to May Vang.

Fourth Cause of Action: Defendants argue again that they cannot be held liable for intentionally inflicting emotional distress because they were acting lawfully in pursuit of a bail fugitive.

"The elements of a cause of action for intentional infliction of emotional distress are well settled. A plaintiff must allege that (1) the defendant engaged in extreme and outrageous conduct with the intention of causing, or reckless disregard of the probability of causing, severe emotional distress to the plaintiff; (2) the plaintiff actually suffered severe or extreme emotional distress; and (3) the outrageous conduct was the actual and proximate cause of the emotional distress. "Whether treated as an element of the prima facie case or as a matter of defense, it must also appear that the defendants' conduct was unprivileged."'" (Ross v. Creel Printing & Publishing Co. (2002) 100 Cal.App.4th 736, 744–745, internal citations omitted.)

Here, plaintiffs have alleged that defendants approached May Vang with guns drawn and pointed toward her while she was in the car with her infant niece, demanded that she let them into the home, refused to identify themselves or provide any documents showing their authority to search the house, and then held her in the house for about two hours without even allowing her to go to the bathroom unless she left the door open and allowed them to watch her. (Complaint, ¶¶ 10-14.) They conducted a thorough search of the house, including breaking into a back room, and when they were unable to find the fugitive, they threatened May Vang with 10 years in prison and with having her niece taken away if she did not tell them where her brother was. (*Id.* at ¶¶ 15, 16.) They also forced her to call her husband and then made the same threats to him. (*Id.* at ¶¶ 17, 18.)

These actions could well be considered extreme and outrageous, and thus they support a claim for intentional infliction of emotional distress. While defendants contend that they were allowed to do everything they are alleged to have done because they were conducting a search for a bail fugitive, they were not necessarily authorized to forcibly enter the home of a private citizen, hold her against her will, and threaten her with jail time, as well as threatening to have CPS take her niece if she did not comply with their demands. Defendants have not cited any authorities showing that their conduct was privileged, and it was certainly far beyond the type of trivial annoyances or insults that have been held insufficient to support an IIED claim. Also, while defendants rely on Penal Code sections 844 and 1299.09 to justify their entry and search of the home, those sections only authorize bail agents or private citizens to forcibly enter a residence when they are in pursuit of a felon. Here, there are no facts alleged that show that Mike Vang was a felon, or that they reasonably believed that he was when they forced their way into the home.

In addition, defendants have not pointed to any allegations in the complaint that would show that their threat to have May Vang locked up for 10 years and her niece taken by CPS was justified and not outrageous. The threat was made to both May Vang and her husband, Mora, so each of the plaintiffs have sufficiently alleged an intentional

infliction of emotional distress claim. Therefore, the court intends to overrule the demurrer as to the fourth cause of action.

Fifth Cause of Action: Defendants argue that plaintiffs cannot state a claim for trespass for the same reasons cited with regard to the other causes of action, namely that they had legal authority to enter the residence and search for the fugitive.

"Trespass is an unlawful interference with possession of property. [Citation.] Peaceable entry on land by consent is not actionable. [Citation.]" (*Girard v. Ball* (1981) 125 Cal.App.3d 772, 788.)

Here, plaintiffs allege that defendants forcibly entered their home by confronting May Vang at gunpoint while she had her infant niece with her, and then searched the home extensively for over two hours without allowing her to leave. While defendants claim that their actions were lawful, they have not cited any authorities that would allow them to force a property owner to let them into their home when they are not in pursuit of someone they reasonably suspect of having committed a felony. Nor does the complaint allege that Mike Vang had committed a felony. At most, he had jumped his bail. Therefore, plaintiffs have stated a sufficient claim for trespass against defendants.

Sixth Cause of Action: The sixth cause of action attempts to state a claim for negligence per se based on violations of several statutes, namely Civil Code sections 43, 51, 51.7, 52 and 52.1.

"Evidence Code section 669 creates a presumption of negligence where a defendant '(1) ... violated a statute, ordinance, or regulation of a public entity; (2) The violation proximately caused death or injury to person or property; (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. [¶] '[T]he doctrine of negligence per se is not a separate cause of action, but creates an evidentiary presumption that affects the standard of care in a cause of action for negligence.' The doctrine of negligence per se does not provide a private right of action for violation of a statute." (*Johnson v. Honeywell International, Inc.* (2009) 179 Cal.App.4th 549, 555-556, internal citations omitted.)

Thus, to the extent that plaintiffs are seeking to state a separate cause of action for "negligence per se", there is no such cause of action. At most, there is an evidentiary presumption of negligence based on the violation of a statute. However, the plaintiffs' claim may be interpreted as an attempt to state an ordinary negligence claim that is supported by allegations of statutory violations. (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1285-1286.)

Defendants contend that, while plaintiffs cite to several statutes that defendants allegedly violated, they do not allege any facts showing how defendants violated those statutes. However, the facts alleged would appear to support plaintiffs' contention that defendants violated Civil Code section 43, at least as to plaintiff May Vang. Section 43

provides that, "Besides the personal rights mentioned or recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, **the right of protection from bodily restraint or harm**, from personal insult, from defamation, and from injury to his personal relations." (Civ. Code, § 43, emphasis added.)

Here, plaintiffs have alleged that defendants confronted May Vang at gunpoint, forced her to let them into her house, restrained her, and threatened her with jail time, as well as threatening to take her niece and put her in CPS custody. These allegations are sufficient to allege a violation of section 43. Thus, the court intends to overrule the demurrer as to May Vang's negligence claim.

On the other hand, it does not appear that Benjamin Mora can state a claim based on the violation of any of the cited statutes. He was not personally threatened with bodily restraint or harm, so he cannot show a violation of section 43. There are also no facts alleged to support a violation of Civil Code sections 51 and 52, the Unruh Civil Rights Act, which prohibits discrimination in the provision of accommodations, advantages, facilities, privileges or services by business establishments. (Civil Code §§ 51, 52.) Plaintiffs do not allege that they attempted to obtain services or to use the facilities of defendants Aladdin or CSI, or that they were denied such facilities or services based on their race, ethnicity, or any other protected classification. Therefore, the alleged violation of section 51 and 52 cannot form the basis for a tort claim.

Plaintiffs have also alleged that defendants' conduct violated Civil Code section 51.7. "The elements of a claim brought under section 51.7 are: (1) the defendant threatened or committed violent acts against the plaintiff; (2) the defendant was motivated by his perception of plaintiff's race; (3) the plaintiff was harmed; and (4) the defendant's conduct was a substantial factor in causing the plaintiff's harm." (*Knapps v. City of Oakland* (N.D. Cal. 2009) 647 F.Supp.2d 1129, 1167, internal citation omitted.)

Here, plaintiffs do not allege that defendants' actions were motivated by their race or ethnicity. They do claim that they were subjected to bodily harm and personal insult, but they do not allege any racial animus with regard to defendants' conduct. (Complaint, ¶ 73.) Therefore, they have not alleged any facts to support a violation of section 51.7.

Finally, plaintiffs have alleged that defendants violated section 52.1, the Bane Act. "Section 52.1 authorizes a claim for relief 'against anyone who interferes, or tries to do so, by threats, intimidation, or coercion, with an individual's exercise or enjoyment of rights secured by federal or state law.' To obtain relief under this statute, a plaintiff must prove that a defendant tried to, or did, prevent the plaintiff from doing something that he had the right to do under the law, or to force plaintiff to do something that he was not required to do under the law." (*Knapps v. City of Oakland, supra*, 647 F.Supp.2d at p. 1168, internal citations omitted.) However, "[I]t is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence." (*Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 111, superseded by statute on other grounds as stated in *Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 842.)

Here, plaintiff May Vang has stated enough facts to show that defendants threatened her with violence in an attempt to intimidate her, as they forced her to let them into the house with guns drawn, and would not allow her to leave or even go to the bathroom without being watched. However, plaintiff Mora was not present at the time of the search and he was not personally threatened by defendants. While he alleges that defendants made threats to him about jailing his wife and placing her niece with CPS, it does not appear that these were the types of threats of violence contemplated by section 51.7. Therefore, plaintiff Mora has not stated a negligence claim based on the violation of any of the cited statutes, and the court intends to sustain the demurrer to the sixth cause of action as to him, without leave to amend.

Seventh Cause of Action: Finally, plaintiffs have attempted to state a negligent supervision claim against Aladdin and CSI based on the alleged failure to train and supervise their agents, which led to plaintiffs' injuries.

“‘An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]’ Negligence liability will be imposed upon the employer if it ‘knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.’” (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815, internal citations omitted.)

Here, defendants contend that plaintiffs have not stated a claim for negligent supervision because they have not alleged any unlawful conduct by the agents, or how the corporate defendants knew or should have known that their agents were unqualified. However, plaintiffs have alleged that defendants' agents confronted May Vang at gunpoint, forced her to allow them in her home, held her against her will, and threatened her with jail time and CPS placement for her niece. These actions are alleged to have been unauthorized and unlawful, and, as discussed above, defendants have failed to show that their actions were necessarily lawful or privileged.

Also, with regard to defendants' contention that plaintiffs have not alleged facts to show that defendants knew of their employees' lack of qualifications, these facts are more likely to be in the sole possession and knowledge of defendants. Therefore, it would not be reasonable to require plaintiffs to allege such facts in their complaint. They have sufficiently alleged knowledge by defendants, and any further facts can be obtained in discovery.

Finally, while defendants claim that plaintiffs have not alleged any harm from the allegedly negligent training and supervision, plaintiffs have alleged that they suffered emotional and physical harm from the defendants' conduct. (Complaint, ¶ 85.) Therefore, the court intends to overrule the demurrer to the seventh cause of action.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 11/7/16
(Judge's initials) (Date)

(24)

Tentative Ruling

Re: ***Felix v. Pichardo***
Court Case No. 16CECG03104

Hearing Date: November 9, 2016 **(Dept. 402)**

Motion: 1) Petition to Compromise Disputed Claim of Minor in Pending Action (Mariela Felix)
2) Petition to Compromise Disputed Claim of Minor in Pending Action (Maritsa Felix)
3) Petition to Compromise Disputed Claim of Minor in Pending Action (Mayra Felix)

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

Explanation:

Pursuant to California Rules of Court, Rule 3.1312 and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 11/7/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Riyad Saddouq v. Wells Fargo, Inc.***
Superior Court Case No. 16 CECG 01575

Hearing Date: November 9, 2016 **(Dept. 402)**

Motion: Demurrer to the First Amended Complaint

Tentative Ruling:

To sustain the general demurrer with leave to amend. Plaintiff is strongly encouraged to seek the advice of an attorney. An amended complaint in strict compliance with the ruling is to be filed within 10 days of notice of the ruling. The time in which the amended complaint is to be filed will run from service by the clerk of the minute order plus 5 days for service by mail. [CCP § 1013].

Explanation:

Background

As stated previously, on June 24, 2014, Wells Fargo filed a limited civil action against Riyad Saddouq for breach of contract based upon his failure to make payments on a credit card issued by Wells Fargo. The amount owed was \$9,800. The case was filed as **14 CECL 05299**. Default was entered on September 22, 2014. A clerk's judgment was requested and entered on **October 23, 2014** in the amount of \$10,095 (including costs.) A writ of execution was issued on November 19, 2015.

On May 17, 2016, Saddouq filed a Complaint against Wells Fargo purporting to allege two causes of action for negligence and violation of Bus. & Prof. Code § 172000 et seq. On June 30, 2016, Defendant filed a general demurrer to each cause of action. This demurrer was sustained with leave to amend. A First Amended Complaint was filed on August 29, 2016.

On October 3, 2016, Defendant filed a general demurrer on the grounds that insufficient facts are stated. Defendant also claims that the action is barred by the doctrine of res judicata. See Notice of Demurrer and Demurrer. The Declaration of Gary Huber is offered in support of the "meet and confer" requirement of CCP § 430.41(a). He states at ¶4 that on September 27, 2016, he emailed the Plaintiff and "inquired as to whether he would be willing to dismiss his First Complaint, so as to avoid the need for a demurrer. On September 28, Plaintiff responded: "Please go ahead and file your Demurrer."

The "meet and confer" Declaration will be deemed marginally sufficient. But, by means of guidance, the email should have been attached. More importantly, there must be a "meet and confer" attempt "for purposes of determining whether an agreement can be reached that would resolve the objections to be raised in the

demurrer." See CCP § 430.31(a). Here, Counsel simply asked the Plaintiff if he would dismiss his pleading or if counsel had to file a demurrer. Thus, there was no attempt to resolve the differences between the parties regarding the First Amended Complaint.

Defendant's Request for Judicial Notice

Again, Defendant requests judicial notice of:

1. Summons and Complaint filed by Wells Fargo on June 24, 2014, in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 1.
2. Proof of Service filed by Wells Fargo on July 9, 2014, in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 2.
3. An October 23, 2014 Default Judgment entered against Riyadh Saddouq in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 3.
4. A July 22, 2015 Writ of Execution entered against Riyadh Saddouq in Fresno County Superior Court Case No. 14CECL05299. A true and correct copy is attached hereto as Exhibit 4.

The request will be granted pursuant to Evidence Code § 452(d). But, as stated previously, the court cannot accept as true the *contents* of pleadings or exhibits in the other action just because they are part of the court record or file. Such documents are inadmissible hearsay in the present case. [*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914]

Merits

The doctrine of res judicata does not apply. As a matter of law, any plaintiff is entitled to seek equitable relief against the judgment in the trial court. See 8 Witkin *California Procedure* (2008 5th Ed) Chapter XI "Attack on Judgment in Trial Court" at VII: "Equitable Relief Against Judgment":

Even where commenced long after the normal period of finality, an independent action in equity is nevertheless not a collateral attack. The action is brought for the express purpose of nullifying the judgment, and is as much a direct attack as a motion for new trial or appeal. (*Campbell-Kawannanako v. Campbell* (1907) 152 C. 201, 209, 92 P. 184; *Bennett v. Hibernia Bank* (1956) 47 C.2d 540, 558, 305 P.2d 20; *Turner v. Milstein* (1951) 103 C.A.2d 651, 655, 230 P.2d 25; *Sternbeck v. Buck* (1957) 148 C.A.2d 829, 831, 833, 307 P.2d 970; *Engbretson & Co. v. Harrison* (1981) 125 C.A.3d 436, 440, 178 C.R. 77; see *Aerojet-General Corp. v. American Excess Ins. Co.* (2002) 97 C.A.4th 387, 398, footnote 3, 117 C.R.2d 427, fn. 7.

In the action at bench, the Plaintiff claims that he was "out of the country" at the time that Wells Fargo filed suit. See page 2 of the First Amended Complaint at lines 15-21. He further claims that the proof of service is false. Id. In the case at bench, the Declaration of the Process Server in the underlying suit states that the address given to him was a business address. He states that he attempted personal service twice and then served an employee "John Doe" allegedly authorized to accept service for Mr. Saddouq. See proof of service and affidavit of reasonable diligence of filed on July 9, 2014 in Case No. 14 CECL 05299. These allegations appear to give rise to an action in equity to set aside the judgment.

However, the First Amended Complaint is still vulnerable to attack. Plaintiff states in boldface at page 3 lines 13-16: "Plaintiff is simply seeking to have the judgment set aside, Plaintiff is prepared to present evidence in support of his claim that he did not receive "actual notice". Plaintiff was overseas at the time of Entry of Judgment and he was never served or had any knowledge of the complaint [CCP § 425.10]." However, **as a matter of law**, Plaintiff must plead facts showing that he had a **"meritorious defense."** [Olivera v. Grace (1942) 19 Cal.2d 570, 575, 122 P.2d 564 [quoting Pomeroy]; see (1989) 212 Cal.App.3d 66, 80; *In re Marriage of Grissom* (1994) 30 Cal.App.4th 40, 46 [quoting Olivera] and Rest.2d, Judgments § 79] Here, the Plaintiff has not addressed the "meritorious defense" requirement. Therefore, the general demurrer will be sustained with leave to amend.

Pursuant to California Rules of Court, Rule 391(a) and Code of Civil Procedure § 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: JYH on 11/8/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(20)

Tentative Ruling

Re: **Wample v. Yosemite Wine & Spirit Int'l Trade Group**, Superior Court Case No. 15CECG03271

Hearing Date: **November 9, 2016 (Dept. 403)**

Motion: Defendant's Motion to Transfer Venue

Tentative Ruling:

To deny. (Code Civ. Proc. § 395.5.) To order award plaintiff reasonable attorneys' fees in the sum of \$2,000, to be paid by defendant within 30 days of service of the order by the clerk. (Code Civ. Proc. § 396b(b).)

Explanation:

The general rule is that "the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the Action." (Code Civ. Proc. § 395.) Code of Civil Procedure section 395.5 provides exceptions to section 395, authorizing filing suits against corporation in the county where the contract was made. (Code Civ. Proc. § 395.5.) Because the consulting agreement was executed in Clovis (see Wample Dec.), venue is proper in Fresno County.

The court exercises its discretion to award plaintiff reasonable attorneys' fees as the prevailing party on this motion. (Code Civ. Proc. § 396b(b).) Attorneys' fees are appropriate here, as prior to the filing of the motion plaintiff advised defendant that venue is proper under section 395.5 because that is where the contract was made. Defendant never directly addresses this ground in any of its papers filed in connection with this motion.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK on 11/4/16
(Judge's initials) (Date)

(30)

Tentative Ruling

Re: **Rosa Mora v. PUSD**
Superior Court No. 16CECG02171

Hearing Date: Wednesday November 9, 2016 (**Dept. 403**)

Motion: Defendants' Motion to Strike

Tentative Ruling:

To **Grant** the motion to strike as to Plaintiff Bautista *only*, based on Business and Professions code section 6125, *without prejudice*.

To **Deny** motion to strike based on guardian ad litem argument.

Plaintiffs are granted **30** days leave to amend. The time in which an amended pleading may be filed will run from service by the clerk of the minute order.

Explanation:

Motion to Strike

Business and Professions Code section 6125

California Business and Professions Code section 6125 prohibits the unauthorized practice of law. And while a person may represent his or her own interests in legal proceedings, a non-lawyer may *not* represent the interests of others. (*J.W. v. Sup.Ct.* (1993) 17 Cal.App.4th 958, 969; *Mossanen v. Monfared* (2000) 77 Cal.App.4th 1402, 1409-1410.) A motion to strike is appropriate where a complaint has been filed by a non-lawyer on behalf of another person. (*CLD Const., Inc. v. City of San Ramon* (2004) 120 Cal.App.4th 1141, 1147.)

Plaintiff Mora brings this action on behalf of herself *and* Plaintiff Bautista. (FAC, p1 ln23; ¶ 84.) Yet it is clear from the face of the First Amended Complaint that Plaintiff Mora is not an attorney (FAC, caption) *and* she admits that she is not. (Opposition, filed 10/21/16, p2 ln 1.) Therefore, the motion to strike is granted as to Plaintiff Bautista *only*, since Plaintiff Mora has the right to represent her own interests.

Guardian Ad Litem

A guardian ad litem is *not a party* to the action but rather the representative of record of a "ward" (e.g., minor) **who lacks capacity** to represent himself. (Code Civ. Proc., 372, subd. (a); *J.W. v. Sup.Ct.*, *supra*, 17 Cal.App.4th 958 at p. 964; *McClintock v. West* (2013) 219 Cal.App.4th 540, 549.) Objections based on lack of capacity to sue must be raised via special demurrer (Code Civ. Proc., § 430.10, subd. (b)) or as an affirmative defense in the answer.

Here, Defendant objects based on "no guardian ad litem . . . identified in the Complaint." (Memo, filed 9/16/16 p3 ln 27.) This argument requires a determination that Plaintiff Bautista lacks capacity; this cannot be determined on a motion to strike.

Code of Civil Procedure section 373

Appointment of a guardian ad litem must be made pursuant to Code of Civil Procedure section 373; use of form application CIV-010 may be necessary. Further, a non-attorney appointed as guardian ad litem *cannot* act in pro per; doing so would constitute the unauthorized practice of law. (Bus. & Prof. Code § 6125; *J.W. v. Sup.Ct.*, *supra*, 17 Cal.App.4th 958 at p. 965.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: KCK **on** 11/4/16
 (Judge's initials) (Date)

Tentative Rulings for Department 501

03

Tentative Ruling

Re: **Toste v. Gottfried**
Case No. 15 CE CG 01234

Hearing Date: November 9th, 2016 (Dept. 501)

Motion: Defendants' Motions to Compel Verified Responses to Supplemental Special Interrogatories, Set One, and Supplemental Requests for Production of Documents, Set One

Tentative Ruling:

To grant defendants' motion to compel plaintiff Mea Cole to provide further verified responses without objections to the supplemental special interrogatories, set one, and supplemental requests for production of documents, set one. (Code Civ. Proc. §§ 2030.300; 2031.310.) Plaintiff shall serve verified responses without objections by December 9th, 2016. To deny defendants' request for evidence, issue or terminating sanctions against plaintiff. To deny plaintiff's request for an order setting aside the court's prior discovery orders against her, without prejudice to her bringing a noticed motion for relief.

Explanation:

Plaintiff has refused to provide verifications to her responses, and she has raised numerous boilerplate objections that are completely unsupported. Plaintiff's counsel concedes that further responses need to be provided, and simply asks that the court allow him an additional 30 days in which to respond since he has been too busy with a trial in another case to respond. Defense counsel has agreed to allow plaintiff until December 9th to serve responses, so the court intends to order plaintiff to serve responses by December 9th, 2016.

Also, while plaintiff's counsel has argued that plaintiff should not be deemed to have waived her objections to the requests because she has been unrepresented and her guardian ad litem cannot waive plaintiff's right to object, the court notes that plaintiff's original responses were served while she was still represented by counsel. It was not until June of 2016 that plaintiff's former attorney was allowed to withdraw as counsel. Therefore, plaintiff's guardian ad litem did not waive plaintiff's right to object. Any waiver was the result of prior counsel's decision to raise only certain objections in the original responses. Therefore, plaintiff will not be allowed to raise any new objections to the discovery that have not already been raised in the last set of responses.

Finally, to the extent that the plaintiff has requested an order from the court setting aside the prior orders compelling her to respond to other discovery requests and deeming her to have admitted the truth of the matters in the requests for admission, the court intends to deny the request without prejudice to plaintiff bringing a properly noticed motion for relief.

Tentative Ruling

Issued By: MWS on 11/8/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Rulings for Department 503

03

Tentative Ruling

Re: **Davis v. Chokatos**
Case No. 12 CE CG 02059

Hearing Date: November 9th, 2016 (Dept. 503)

Motion: Plaintiff's Motion to Vacate Court's Order Setting Aside the
Default Judgment against Defendant Green

Defendants' Motion for an Order Requiring Plaintiff to Post
Security Before the Matter Proceeds

Tentative Ruling:

To continue both motions to December 13th, 2016 at 3:30 p.m. in Department 503 to allow plaintiff time to research, draft, and file his opposition to defendant's motion, and to allow plaintiff time to review the court's tentative ruling on his own motion to vacate the order setting aside the default against defendant Green. (See below.) Plaintiff's opposition to defendant's motion will be due no later than the close of business on November 30th, 2016. Defendants' reply will be due on December 6th, 2016.

With regard to plaintiff's motion to vacate the order setting aside the default against defendant Green, the court intends to deny the motion. (Code Civ. Proc. §§ 1008, subd. (a).)

Explanation:

Plaintiff's Motion to Vacate Order Setting Aside Default Judgment: It appears that plaintiff is essentially asking for reconsideration of the order granting Green's motion to set aside the default, and possibly the order dismissing Green from the case. However, plaintiff has not complied with any of the requirements of Code of Civil Procedure section 1008. Under section 1008, subdivision (a),

When an application for an order has been made to a judge, or to a court, and refused in whole or in part, ... any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. (Code Civ. Proc., § 1008, subd. (a).)

Also, "A party seeking reconsideration also must provide a satisfactory explanation for the failure to produce the evidence at an earlier time." (*New York Times Co. v. Superior Court* (2005) 135 Cal.App.4th 206, 212, internal citations omitted.) The requirements of section 1008 are jurisdictional, and failure to comply with the requirement of demonstrating new facts, circumstances or law requires denial of a motion for reconsideration. (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1104.) However, the trial court does retain its inherent authority to reconsider its orders on its own motion. (*Id.* at 1107.)

Here, while plaintiff does not specifically cite to section 1008, he appears to be seeking reconsideration of the court's prior order granting Green's motion to set aside the default against him. However, plaintiff has not brought his motion within 10 days of the date of the order that he is asking the court to reconsider. In fact, the order granting the motion to set aside the default was granted in January of 2016, over nine months ago. Also, plaintiff was clearly aware of the order, since he attempted to have the court set it aside at the March 3rd, 2016 hearing on the motion for dismissal. Plaintiff has not offered any excuse for his lengthy delay in filing his motion for reconsideration. Therefore, the motion for reconsideration is untimely.

Nor has plaintiff pointed to any new or different facts, circumstances or law that would justify granting reconsideration. He simply argues that the court's prior orders were incorrect and improperly granted, without pointing to any new facts or law that would support a request for reconsideration. Thus, plaintiff has not complied with the requirement of showing new facts, circumstances or law to justify reconsideration.

Also, while plaintiff cites to Code of Civil Procedure sections 663 and 473, plaintiff is not entitled to relief under these sections. Section 663 deals with motions for new trial where there has been an incorrect or erroneous legal basis for the decision, or where the judgment or decree is not consistent with the special verdict. However, this section is only applicable where there has been a judgment after a court trial or jury verdict, not where the court has granted an interim order to set aside a default. Therefore, section 663 is not applicable here.

Section 473, subdivision (b), allows a party to move for relief from a judgment, order, dismissal, or other proceeding taken against him or her "through *his or her* mistake, inadvertence, surprise, or excusable neglect." (Code Civ. Proc. § 473, subd. (b), emphasis added.) Thus, the mistake, inadvertence, surprise or excusable neglect must be on the part of the party moving for relief, not the court or the other parties.

Here, plaintiff has not shown that the order granting the motion to set aside the default was made due to his mistake, inadvertence, surprise or excusable neglect. In fact, he argues strenuously that it was the *court's* mistake, as well as the fraudulent conduct of the defendants, that caused the order to be made. This is not a valid basis for relief from an order under section 473, subdivision (b).

Moreover, to the extent that the plaintiff argues that the court should grant relief under its inherent power to grant reconsideration of its orders at any time on its own motion (*Le Francois v. Goel, supra*, 35 Cal.4th at p. 1107), the court declines to exercise its

inherent discretion to reconsider its order. Plaintiff has not cited to any facts or law that would warrant reconsideration of the order setting aside the default of Green. Plaintiff implicitly admits that he did not serve Green with the summons and complaint before obtaining his default, as he repeatedly alleges that the defendants have refused to provide him with Green's address so that he can be served. If Green was not served with the summons and complaint, then the default against him was improperly entered, and the court's order setting it aside was proper. Indeed, it would have been a denial of due process to allow the default to stand, and any default judgment entered against Green would have been void. (*Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1249.) Consequently, the court will not reconsider its prior order under its inherent power.

Likewise, the court declines to reconsider its order dismissing Green for failure to serve him within three years. Again, plaintiff impliedly admits that he did not serve Green within the three year statute, as he admits has been unable to locate him. Thus, the order dismissing Green from the action for failure to serve him with the complaint within three years was proper.

While plaintiff contends that there were other orders from other courts that had previously denied the same motion, and that it was improper for this court to grant the dismissal motion after it had been denied by the other courts, it is unclear to which orders plaintiff is referring. In any event, any such orders would have been interim orders, not final judgments, so they would not be binding on this court under the doctrine of *res judicata*. (Code Civ. Proc. § 1908; *Poochigian v. Layne* (1953) 120 Cal.App.2d 757, 763: Under doctrine of *res judicata*, a final judgment on merits bars parties or their privies from relitigating claims which were litigated or could have been litigated in prior action.) Simply because another judge may have denied a prior motion to dismiss under the three-year statute does not mean that there was a final judgment or order in the case that was binding on this court and precluded a later motion to dismiss.

Therefore, the court intends to deny the motion to vacate the prior order setting aside the default against Green, as well as the implied motion to set aside the dismissal order.

Defendants' Motion to Require Plaintiff to Post Security: The court intends to continue the motion to post security to December 13th, 2016 to allow plaintiff time to prepare and file his opposition. Plaintiff claims that he has been unable to go to the law library to research the issues raised by the motion due to prison lockdowns, limited hours at the library, and his own class schedule. The court usually grants a two-week continuance in cases where one of the parties is a prisoner, so granting a 30-day continuance here does not appear to be unreasonable, especially since granting the motion to post security may make it effectively impossible for plaintiff to prosecute his case. Therefore, before the court considers the merits of such a drastic motion, it will allow plaintiff a chance to research the issues and present his opposition.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 11/7/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Jorge Gonzalez et al. v. Carlos Lopez Castro et al.***
Superior Court Case No. 15 CECG 00160

Hearing Date: November 9, 2016 (**Dept. 503**)

Motion: By the Van Ryn Defendants for summary judgment, or
in the alternative, summary adjudication

Tentative Ruling:

To treat the motion as a motion for judgment on the pleadings and grant with leave to amend. An amended complaint in **strict compliance** with the ruling is to be filed within 10 days of notice of the ruling. As a matter of law, the moving Defendants will have 30 days to file an Answer or other responsive pleading. [CCP § 412.20(a)(3)] The motion for summary judgment will be stayed. Once an Answer is filed to the operative complaint, the motion will be placed back on calendar. Defendants' counsel is to contact the Department directly for the re-calendar.

Explanation:

Role of Pleadings in Summary Judgment

A summary judgment motion must show that the “*material facts*” are undisputed (CCP § 437c(b)(1)). The pleadings serve as the “outer measure of materiality” in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. [*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co.* (2010) 181 Cal.App.4th 60, 74—“the pleadings determine the scope of relevant issues on a summary judgment motion”; *Hutton v. Fidelity Nat'l Title Co.* (2013) 213 Cal.App.4th 486 at 493—summary judgment defendant need only “negate plaintiff’s theories of liability as *alleged in the complaint*; that is, a moving party need not refute liability on some theoretical possibility not included in the pleadings” (emphasis in original);

A defendant’s motion for summary judgment or summary adjudication “necessarily includes a test of the sufficiency of the complaint” and its legal effect is the same as a demurrer or motion for judgment on the pleadings. [*American Airlines, Inc. v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118; *Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1377] When a motion for summary judgment is used to test whether the complaint states a cause of action, the court must accept the allegations of the complaint as true. It cannot consider facts alleged in opposing declarations. [*American Airlines v. County of San Mateo*, *supra*, 12 Cal.4th at 1118; *Koehrer v. Sup.Ct. (Oak Riverside Jurupa, Ltd.)* (1986) 181 Cal.App.3d 1155, 1171 (disapproved on other grounds in *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654]

If the court concludes the complaint (or any claim or defense) is insufficient as a matter of law, it “may elect to treat the hearing of a summary judgment motion as a

motion for judgment on the pleadings and grant the opposing party an opportunity to file an amended complaint to correct the defect." [Hobson v. Raychem Corp. (1999) 73 Cal.App.4th 614, 625 (disapproved on another point in Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal.4th 1019, 1031, fn. 6); People ex rel. Dept. of Transp. v. Outdoor Media Group (1993) 13 Cal.App.4th 1067, 1074] When the court makes this election, summary judgment should be stayed pending the amendment. [See College Hosp., Inc. v. Sup.Ct. (Crowell) (1994) 8 Cal.4th 704, 719, fn. 5; Prue v. Brady Co./San Diego, Inc. (2015) 242 Cal.App.4th 1367, 1384; Dang v. Smith (2010) 190 Cal.App.4th 646, 664.

The First Amended Complaint at Bar

Chain-Letter Pleading

The First Amended Complaint is not well pleaded. This makes it difficult to determine "the material facts" for purposes of summary judgment. The pleading sets forth a "narrative" at ¶¶ 16-29 under the heading "Allegations as to All Causes of Action." Then, "like a chain-letter", these allegations are incorporated by reference into **each** of the causes of action. See ¶¶ 30, 36, 43, 50, 57, 64, and 72. This method of pleading has been criticized as creating **ambiguity** and **redundancy**. See *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179 and *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605.

Failure to Plead Ultimate Facts

More importantly, by pleading in this manner, the case has not been evaluated in a lawyer-like fashion. As a result, the facts that constitute the **elements** of each cause of action have not been isolated. As a matter of law, the complaint must contain "a statement of the facts constituting the **cause of action**, in ordinary and concise language." [CCP § 425.10 (emphasis added)] The "facts" to be pleaded are those upon which liability depends—i.e., "the facts constituting the cause of action." These are commonly referred to as "ultimate facts." [See *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531 at 550]

Failure to plead ultimate facts subjects the complaint to *demurrer* for failure to "state facts constituting a cause of action." [CCP § 430.10(e); *Berger v. California Ins. Guar. Ass'n* (2005) 128 Cal.App.4th 989, 1006] "A complaint must allege the ultimate facts necessary to the statement of an actionable claim. It is both improper and insufficient for a plaintiff to simply plead the evidence by which he hopes to prove such ultimate facts." [*Careau & Co. v. Security Pac. Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1390] In the end, the Plaintiffs ask the Court to "pick and choose" from among 13 paragraphs of "facts" to supply the elements for each cause of action. This is completely improper.

"Innuendo" Pleading

Another problem with the First Amended Complaint is that the allegations are not direct. They consist of opinions of the pleaders and material that is inferential and argumentative. This is also improper. [*Taylor v. Parsons* (1940) 41 Cal. App. 2d 315, 106

P.2d 638; *Hauser v. Pacific Gas & Elec. Co.* (1933) 133 Cal. App. 222, 23 P.2d 1068; *Roberts v. Roberts* (1947) 81 Cal. App. 2d 871, 185 P.2d 381 (disapproved of on other grounds by *Spellens v. Spellens* (1957) 49 Cal. 2d 210, 317 P.2d 613] More egregiously, the **facts** are pleaded in the alternative. As a matter of law, inconsistent legal *theories* are permissible in any complaint, verified or not. But **inconsistent factual allegations are not permitted**. [*Steiner v. Rowley* (1950) 35 Cal.2d 713, 718-719; see also *Manti v. Gunari* (1970) 5 Cal.App.3d 442, 449 (noting rule applies to both verified and unverified pleadings)]

Issue of Standing

Finally, the First Amended Complaint is pleaded as though each Plaintiff has standing to state a cause of action for negligence and wrongful death. This is **incorrect**. Only those Plaintiffs injured by the accident can sue for negligence; i.e., Plaintiff's decedent and Alexis. A plaintiff's lack of standing is treated as a “**jurisdictional**” defect and is *not* waived by defendant's failure to raise it by demurrer or answer: “(C)ontentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding.” [*Common Cause of Calif. v. Board of Supervisors of Los Angeles County* (1989) 49 Cal.3d 432, 438—lack of standing can be raised for first time on appeal; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 912 (same); and *Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 501] Standing to sue affects the right to relief and goes to the existence of a cause of action against the defendant. [See CCP § 430.80; *Killian v. Millard* (1991) 228 Cal.App.3d 1601, 1605]

To the extent that Plaintiffs intended to allege a cause of action for negligence on behalf of the decedent, Guadalupe Ceja, a cause of action that survives the decedent's death may be commenced by the decedent's personal representative. (Certain damages claims do **not** survive: e.g., pain, suffering and disfigurement, except elder abuse; see CCP § 377.34 & Welf. & Inst.C. § 15657(b).)

If no representative has been appointed, suit may be commenced by the decedent's “*successors in interest*” (persons entitled to inherit claim). [CCP § 377.30] Accordingly, the “*successor in interest*” must execute and file an affidavit or declaration pursuant to CCP § 377.32. This allows decedent's heirs to pursue claims belonging to the decedent where there are no assets to be probated or after the probate proceedings are closed. [*Parsons v. Tickner* (1995) 31 CA4th 1513, 1523-1524, 37 CR2d 810, 815] The statute does *not* require that the declaration be filed before commencing the action. “However, failure to file the affidavit could possibly subject the action to a *plea in abatement*.” [*Parsons v. Tickner*, *supra*, 31 Cal.App.4th at 1524. In the case at bench, **no declaration** pursuant to CCP § 377.32 was filed. As a result, the motion for judgment on the pleadings should be granted as to the second, third, fifth and sixth causes of action with leave to amend.

In contrast, a wrongful death suit by the personal representative is *on behalf of* the heirs (CCP § 377.60). Thus, **either** the personal representative or the heirs may bring the wrongful death action, **but not both**. (Nor, therefore, can the heirs be joined as parties in the personal representative's wrongful death suit.) [*Adams v. Sup.Ct. (Centinella Freeman Regional Med. Ctr.)* (2011) 196 Cal.App.4th 71, 77—personal

representative brings action as “a statutory trustee to recover damages for the benefit of the heirs”]. Also, in a wrongful death action, the plaintiff cannot recover the type of damages available in a “survivor” action; e.g., medical expenses incurred by the decedent (unless paid for by the plaintiff); decedent’s wage losses or impaired earning capacity (unless plaintiff was financially dependent upon the decedent); decedent’s pain and suffering and/or damages for disfigurement. [*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 819; *Corder v. Corder* (2007) 41 Cal.4th 644, 661; *DeMeo v. St. Francis Hosp.* (1974) 39 Cal.App.3d 174, 176-177]

Importantly, the claimants cannot recover for their personal grief, sorrow and anguish occasioned by the death. The general mental suffering that naturally ensues from a loved one’s death is simply **not compensable** in a wrongful death action. [*Corder v. Corder*, supra, 41 Cal.4th at 661; see *Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 199; *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 720; *Krouse v. Graham* (1977) 19 Cal.3d 59.] On the other hand, damages are available from the loss of love, companionship, affection and the like. See *Hiser v. Bell Helicopter Textron Inc.* (2003) 111 Cal.App.4th 640, 658, (noting that “the line between relevant and irrelevant evidence on these topics may be difficult to draw”)]

Ruling

First, the Court questions why the action was filed in Fresno County. The accident occurred in **Tulare County**. The property where the trees were cut is located in Tulare County. All of the Defendants are residents of Tulare County or maintain a principal place of business in that County, except for Defendant Singh, who is alleged to be a resident of Fresno County. Mr. Singh allegedly owned the car driven by Castro at the time of the accident. But, Mr. Singh was later dismissed on May 14, 2015. He was re-named as a Defendant when the First Amended Complaint was filed but not re-served. Notably, if the active Defendants had moved for a change of venue, sanctions could have been imposed against Plaintiffs’ counsel. [CCP § 396(b)]

Second, a review of the First Amended Complaint reveals that much of the case appears to be founded on tenuous theories of liability. To reiterate, the “material facts” for purposes of summary judgment are those pleaded. Given the pleading defects of the First Amended Complaint, the motion for summary judgment will be treated as a motion for judgment on the pleadings. [*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1384] However, leave to amend will be granted. The motion for summary judgment will be stayed. *Id.*

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: A.M. Simpson on 11/7/16
(Judge’s initials) (Date)

